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Mondelez Malaysia Sdn Bhd v Public Prosecutor

B HIGH COURT (GEORGETOWN) — CRIMINAL REVISION NO PA-44–38–07 OF 2019
MOHD RADZI JC
7 JANUARY 2020

C *Criminal Procedure — Consent or sanction — Consent — Validity of consent — Summons issued against applicant for offence under reg 38(1) of the Food Regulations 1985 — Applicant raised objection on ground that there was no consent filed by prosecution — Magistrate's court rejected objection — Applicant*
D *filed notice of motion — Allegation that consent did not contain name of deputy public prosecutor — Whether valid consent was filed by prosecution pursuant to s 32A of the Food Act 1983 — Criminal Procedure Code ss 51A & 325 — Food Act 1983 s 32A — Food Regulations 1985*

E The magistrate's court had issued a summons against the applicant for an offence under reg 38(1) of the Food Regulations 1985. The applicant had raised an objection against the validity of the proceedings on the ground that there was no consent that enabled the court to take cognisance of the offence and to initiate proceedings against the applicant. The magistrate had rejected
F the objection raised by the applicant. The applicant subsequently filed this notice of motion ('NOM') seeking the revision powers of the High Court under s 325 of the Criminal Procedure Code ('the CPC') to set aside and/or quash the prosecution of the offence against the applicant on the basis that the consent dated 3 August 2018 was invalid as it did not contain the name of the
G deputy public prosecutor. The issue raised was whether a valid consent was filed by the prosecution pursuant to s 32A of the Food Act 1983 ('the Act'). In relation to this issue, the court had to determine which of the copy exhs EG3, EG5 or RIH3 was the valid consent or none at all. EG3 was the copy of consent delivered by the prosecution to the applicant whereas EG5 and RIH3 were the
H copies of consent delivered by the magistrate to the applicant. The differences between EG5 and RIH3 were that as compared to the former, the latter contained a marking 'B' at the top right hand corner of the document and a barely legible shadow of some kind of print or chop at the space where the name of the deputy public prosecutor was to be inserted. It ought to be noted that,
I there were two copies of consent found in the magistrate court's physical file ('the file'). One of the copies had 'B' marked at the top right-hand corner ('marked copy') and the other was unmarked ('unmarked copy').

Held, dismissing the NOM:

(1) With regards to EG3, there was no obligation on the prosecution to ensure that the copy of the consent provided pursuant to s 51A of the CPC must be a copy of the consent actually filed in the magistrate's court. Where the copy of the consent did not appear to comply with the requirements of the law, as in the present case, then the consent that was filed in the magistrate court and which would be tendered as part of the evidence for the prosecution would be subject to challenge (see para 27).

(2) The court found that EG5 corresponded with the unmarked copy in terms of the handwriting of the dates and the signature. It was fairly obvious therefore that when the magistrate's court faxed a copy of the consent the sender picked the unmarked copy. That explained why EG5 did not have the marking 'B' at the top right-hand corner similar to RIH3. As for the absence of the name chop or name of the deputy public prosecutor, that can be attributed to the faint light blue colour name chop that was affixed to the consent. The poor quality of the name chop may have caused its image to be lost and not capable of being reproduced when it was transmitted via facsimile. Based on those reasons the court found no reason to conclude that EG5 was an invalid consent. The unmarked copy as found in the File had the name chop of the deputy public prosecutor, the date and signature. In the evaluation and finding of the court, this copy therefore constituted a valid proof of consent under s 32A of the Act (see para 28).

[Bahasa Malaysia summary

Mahkamah majistret telah mengeluarkan saman terhadap pemohon atas kesalahan di bawah peraturan 38(1) Peraturan-Peraturan Makanan 1985. Pemohon telah mengemukakan bantahan terhadap kesahihan prosiding tersebut dengan alasan tidak ada persetujuan yang memungkinkan mahkamah untuk menyedari kesalahan dan untuk memulakan prosiding terhadap pemohon. Majistret telah menolak bantahan yang dikemukakan oleh pemohon. Pemohon kemudian mengemukakan notis usul ini ('NU') memohon kuasa semakan Mahkamah Tinggi di bawah s 325 Kanun Tatacara Jenayah ('KTJ') untuk mengetepikan dan/atau menghentikan pendakwaan kesalahan terhadap pemohon atas dasar bahawa persetujuan bertarikh 3 Ogos 2018 tidak sah kerana tidak mengandungi nama timbalan pendakwa raya. Isu yang dibangkitkan adalah sama ada persetujuan yang sah telah difailkan oleh pihak pendakwaan berdasarkan s 32A Akta Makanan 1983 ('Akta'). Berhubung dengan isu ini, mahkamah harus menentukan salinan mana di antara ekshs EG3, EG5 atau RIH3 yang merupakan persetujuan yang sah atau tidak terdapat persetujuan sama sekali. EG3 adalah salinan persetujuan yang disampaikan oleh pihak pendakwaan kepada pemohon manakala EG5 dan RIH3 adalah salinan persetujuan yang disampaikan oleh majistret kepada pemohon. Perbezaan antara EG5 dan RIH3 adalah bahawa jika dibandingkan dengan dengan yang EG5, RIH3 mengandungi tanda 'B' di sudut kanan atas

dokumen dan bayangan yang hampir tidak dapat dibaca dari beberapa jenis cetakan atau cop di ruang di mana nama timbalan pendakwa raya dimasukkan. Harus diingat bahawa, terdapat dua salinan persetujuan yang terdapat dalam fail fizikal mahkamah majistret ('fail'). Salah satu salinan bertanda 'B' di sudut kanan atas ('salinan bertanda') dan yang satu lagi tidak ditandai ('salinan tidak bertanda').

Diputuskan, NU ditolak:

(1) Berkenaan dengan EG3, tidak ada kewajiban ke atas pihak pendakwaan untuk memastikan bahawa salinan persetujuan yang diberikan berdasarkan s 51A KTJ mestilah salinan persetujuan yang sebenarnya difailkan di mahkamah majistret. Jika salinan persetujuan tidak memenuhi keperluan undang-undang, seperti dalam kes semasa, maka persetujuan yang difailkan di mahkamah majistret dan yang akan dikemukakan sebagai sebahagian keterangan pihak pendakwaan boleh dicabar (lihat perenggan 27).

(2) Mahkamah mendapati bahawa EG5 selaras dengan salinan yang tidak bertanda dari segi tulisan tangan tarikh dan tandatangan. Oleh itu, cukup jelas bahawa ketika mahkamah majistret mengirim salinan persetujuan melalui faks, pengirim memilih salinan yang tidak bertanda. Itu menjelaskan mengapa EG5 tidak mempunyai tanda 'B' di sudut kanan atas yang serupa dengan RIH3. Adapun ketiadaan cop nama atau nama timbalan pendakwa raya, ini dapat dikaitkan dengan cop nama berwarna biru muda samar yang diturunkan ke atas persetujuan tersebut. Kekurangan kualiti cop nama mungkin menyebabkan ianya hilang dan tidak dapat dihasilkan semula ketika ia dihantar melalui faksimili. Berdasarkan alasan tersebut, mahkamah tidak mempunyai alasan untuk menyimpulkan bahawa EG5 adalah persetujuan yang tidak sah. Salinan yang tidak bertanda seperti yang terdapat di dalam fail mempunyai nama timbalan pendakwa raya, tarikh dan tandatangan. Dalam penilaian dan penemuan mahkamah, salinan ini merupakan bukti persetujuan yang sah di bawah s 32A Akta (lihat perenggan 28).]

Cases referred to

Liaw Kwai Wah & Anor v Public Prosecutor [1987] 2 MLJ 69, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 31
Criminal Procedure Code ss 51A, 325, 377(b)
Food Act 1983 s 32A
Food Regulations 1985 reg 38(1)

Esther Goh Lee Ern (Joachim Francis Xavier with her) (Chooi & Company) for the applicant.

Rais Imran bin Hamid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Radzi JC:

MATTER BEFORE THIS COURT

[1] The matter before this court is with respect to a notice of motion dated 19 July 2019 ('NOM') filed by the applicant seeking the revision powers of this court with respect to the matter of whether a valid consent ('consent') was filed by the prosecution pursuant to s 32A of the Food Act 1983 ('the Act').

PROCEEDINGS BEFORE THE MAGISTRATE

[2] A summons was issued against applicant by the magistrate's court for an offence under reg 38(1) of the Food Regulations 1985 ('summons').

[3] The summons read as follows:

> Bahawa kamu pada 9.3.2018 lebih kurang jam 3.45 petang, di Kompleks Kargo Udara Ke-2 Lapangan Terbang Antarabangsa P24, Bayan Lepas dalam daerah Barat Daya dalam Negeri Pulau Pinang, telah mengimport Cheese Powder Flavour yang setelah dianalisis mengandungi cemaran logam cadmium dalam kadar 1.41 mglkg di mana melebihi kadar maksimum dibenarkan iaitu 1 mglkg merujuk Jadual Keempat Belas, Daftar 1, Ruang (1) Bahan Perisa, Peraturan-Peraturan Makanan 1985. Oleh itu, kamu telah didapati melanggar peruntukan di bawah Peraturan 38(1) Peraturan-Peraturan Makanan 1985.

[4] On 10 October 2018 when the matter first came up for mention before the magistrate, the prosecuting officer had tendered two documents to the magistrate court. A document marked as 'encl A' was the authority to prosecute pursuant to s 377(b) of the Criminal Procedure Code ('the CPC') and a document marked as 'encl B' that is the consent to prosecute pursuant to s 32A of the Act.

[5] When the matter came up for trial again on 28 May 2019, learned counsel for the applicant raised an objection with regards to the validity of the proceedings before the court on the grounds that there was no consent that enabled the court to take cognisance of the offence and to initiate proceedings against the applicant. Essentially it was the assertion before the magistrate that the copy of the consent dated 3 August 2018 that was delivered to the applicant pursuant to s 51A of the CPC did not contain the name of the deputy public prosecutor notwithstanding that it contained a signature at the space marked 'Timbalan Pendakwa Raya, Negeri Pulau Pinang'. Since the name of the deputy public prosecutor was not found on the copy of the consent, the

consent was therefore defective and by that reason the magistrate court could not have cognisance of the offence and consequently the issuance of the summons is invalid.

[6] It was argued by the prosecution that a copy of the consent is not obligatory to be delivered to the applicant under s 51A of the CPC and that the relevant copy is one that is filed with the court.

[7] After considering the submissions of the prosecution and counsel for the applicant, the magistrate rejected the objection. The applicant's counsel applied for a stay of proceedings pending filing and hearing of a review of the magistrate's ruling on the objection. The request was allowed, thus the NOM was filed and brought to be adjudicated before this court.

THE NOTICE OF MOTION AND PROCEEDINGS BEFORE THIS COURT

[8] Via the NOM, the applicant seeks the powers of revision this court pursuant to s 325 of the CPC to set aside and/or quash the prosecution of the offence against the applicant on the basis that the consent dated 3 August 2018 is invalid as it did not contain the name of the deputy public prosecutor.

[9] The NOM is supported by the affidavit of Esther Goh Lee Ern, counsel for the applicant who was empowered to affirm the affidavit in support on behalf of the applicant ('AIS-E'). In AIS-E, the applicant exhibited a copy of the consent that was delivered by the prosecution to the applicant pursuant to s 51A of the CPC. Exhibit EG3 in AIS-E contains all the documents that were delivered by the prosecution to the applicant including the consent dated 3 August 2018. A look at the copy of the consent in exh EG3 will show that the name of the deputy public prosecutor is absent on its face.

[10] According to AIS-E, on 3 June 2019, she wrote to the Magistrate Court at Balik Pulau, Pinang requesting for copies of the relevant documents including the consent. By a letter dated 4 July 2019, the magistrate court complied with the request and provided copies of the relevant documents including a copy of the consent dated 3 August 2018. That copy is marked as exh EG5 in AIS-E.

[11] A comparison of the exhs EG3 and EG5 will show that both copies do not have the name of the deputy public prosecutor and more importantly, exh EG5 seems to contain a different signature than that contained in exh EG3. That raises the question of which of these two documents is the actual consent that was filed with magistrate court. In both copies the name of the deputy public prosecutor is absent and therefore the applicant believes that

there is no valid consent filed with the magistrate court.

[12] The NOM and AIS-E was served on the respondent. An affidavit in reply dated 13 September 2019 by Rais lmran bin Hamid ('Rais') was filed on behalf of the respondent and served on the applicant ('AIR-R1'). Rais stated that on 23 August 2019, he wrote to the magistrate court requesting for copies of the relevant documents pertaining to the proceedings before the Magistrate including the consent. The magistrate court responded by way of a letter dated 3 September 2019 enclosing the relevant documents including a copy of the consent. This copy of the consent is marked as exh RIH3 in AIR-R1.

[13] Exhibit RIH3 discloses a seemingly different copy of the consent compared to exhs EG3 and EG5. The difference is that this copy contains a marking 'B' at the top right hand corner of the document and a barely legible shadow of some kind of print or chop at the space where the name of the deputy public prosecutor is to be inserted. Exhibit RIH3 thus added to the confusion regarding which of these documents ie exhs EG3, EG5 and RIH3, is the actual consent.

[14] The applicant then responded with an affidavit in reply dated 14 October 2019 affirmed again by Esther Goh Lee Ern for the applicant ('AIR-E'). In this affidavit, Esther produced the notes of proceedings at the magistrate court to highlight the events that transpired before the magistrate and to further emphasise the uncertainty of the consent.

[15] When this matter was fixed for hearing again before this court on 17 October 2019, this court held the view that after considering AIS-E, AIR-R1, exhs EG3, EG5 and RIH3, a physical inspection of the magistrate court file was inevitable and therefore ordered for the file to be remitted to this court for inspection. This court further ordered that the deputy public prosecutor Shafiq bin Mahadi whom according to AIR-R had affixed his chop and signed the consent on exh RIH3 to affirm an affidavit to explain the circumstances and confusion regarding the consent. This court then adjourned this matter to 22 November 2019 for continued hearing.

[16] By the 22 November 2019, two additional affidavits were filed for the respondent. One was an affidavit by Rais dated 14 November 2019 (AIR-R2) and an affidavit by Shafiq bin Mahadi affirmed on 15 November 2019 (A-SM). AIR-R2 is a general response to AIR-E and asserts that a physical inspection of the magistrate court's file will show that exh RIH3 is the valid consent. The more important affidavit is A-SM. In his affidavit, Shafiq bin Mahadi had primarily confirmed that exh RIH3 dated 3 August 2019 was issued and signed by him.

SUBMISSIONS

[17] Learned counsel for the applicant submitted that notwithstanding A-SM, there remains a doubt as to which of the different versions of the consent ie exhs EG3, EG5 or RIH3 is the valid consent since Shafiq bin Mahadi did not explain in A-SM why there was a version exhs EG3 and EG5. That failure to explain has the effect of putting the issues unanswered. Learned counsel for the applicant further stated that if A-SM had clearly explained the differences to the satisfaction of this court then the applicant would have been ready to abandon the application.

[18] The differences that remain unanswered, according to the applicant, are as follows:

(a) exhs EG3 and EG5 seem to contain different signatures;

(b) there are differences in writings at the space for insertion of dates in exhs EG3, EG5 and RIH3;

(c) there is a mark 'B' at the top right hand corner of exh RIH3 but such mark is not present in the other copies; and

(d) there appears to be an imprint on exh RIH3 but that imprint is absent from the exh EG5 being the copy of consent that was faxed by the magistrate court to the applicant.

[19] Based on the above factors, it was submitted that there remains a doubt on which of the consent between exhs EG3, EG5 and RIH3 is the correct and valid consent and that doubt should be for the benefit of the applicant.

[20] Learned deputy public prosecutor essentially argued that exh RIH3 is the correct copy of the consent and that copy is the copy that was filed in the magistrate court. According to him, there were two copies of the consent filed, one with the complaint and the other was marked as 'encl B' during the court proceedings on 10 October 2019. Thus, according to learned deputy public prosecutor, the magistrate was correct in rejecting the preliminary objection.

[21] In response to that argument learned counsel for the applicant submitted that A-SM did not offer any explanation on the issue. At best, what was related to by the deputy public prosecutor was just a statement from the Bar and cannot be taken as a confirmation of fact. The uncertainty therefore remains unanswered.

THE LAW ON CONSENT

[22] Section 32A of the Act clearly states that no prosecution shall be instituted for an offence under the Act or any regulation without the consent in writing of the public prosecutor. It is trite law that where a written consent is required for the institution of a prosecution and that written consent is not obtained it will render the charge and prosecution is invalid.

POWER OF REVISION

[23] The power of revision by the High Court are found in s 31 of the Courts of Judicature Act 1964 and s 325 of the CPC.

[24] Abdul Hamid CJ (as he then was) in the Supreme Court case of *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69, described the duty of the High Court in exercising its revisionary powers as follows:

> Duty of High Court
>
> Basically, the duty lies with the High Court to see that the criminal law is properly administered by an inferior court.
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> The Judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court. Where, for instance, a convicted person has scrupulous objection to invoke the jurisdiction of a High Court, either on a question of legality of conviction or error of law concerning the conviction or sentence, the Judge ought to call for and examine the record with a view to exercising the revisionary power to correct a miscarriage of justice.

ANALYSIS OF FACTS BY THIS COURT

With regards to exh EG3

[25] It is clear that the only crucial question to be answered in this case is which of the copy exhs EG3, EG5 or RIH3 is the valid consent or none at all. It is unfortunate that the case management system ('CMS') is currently not available at the magistrate court in question. A record of the filing of the summons and consent would have been available in the CMS system and that would have easily and conclusively provided the answer to that question. It therefore falls upon this court to undertake a scrutiny of the documents found in the magistrate court's physical file ('file').

[26] In this court's view the only copy that is relevant to be considered is that which is found in the file. That would have been the copy or copies that were filed by the deputy public prosecutor. After inspecting the contents of the file this court finds that there are two copies of the consent. Both contained a faint

blue chop with the words 'SHAFIQ BIN MAHADI, Timbalan Pendakwa Raya, Pulau Pinang'. Each copy is signed, presumably by Shafiq bin Mahadi. Both are dated 3 August 2018. One of the copies has 'B' marked at the top right hand corner of the page ('marked copy') and the other is unmarked ('unmarked copy'). The marked copy contains also a handwritten correction next to the column for the date of the consent.

[27] Looking first at exh EG3 found in AIS-E, this courts finds that this copy corresponds with the marked copy save for the absence of the name chop. However, whether or not the exh EG3 corresponds with any of the copy in the file is not crucial to the issue. Whilst it would have been most ideal if an explanation of EG3 is found in A-SM, that absence does not affect the eventual finding of this court. Exhibit EG3 may have been an extra copy that was kept by the prosecution and whether or not it is the copy of the consent that is found in the court file is inconsequential to the issue. There is no obligation on the prosecution to ensure that the copy of the consent provided pursuant to s 51A of the CPC must be a copy of the consent actually filed in the magistrate court. All the prosecution needs to do at that stage is just provide a copy of the consent even if it was just an extra copy to serve as a confirmation that such a consent was filed and will be part of the evidence that will be tendered for the prosecution. Where the copy of the consent does not appear to comply with the requirements of the law, as in this case, then the consent that was filed in the magistrate court and which will be tendered as part of the evidence for the prosecution will be subject to challenge. For those reasons this court dismisses further consideration of exh EG3 as being irrelevant for determination of the issues in this case.

With regards to exh EG5

[28] Comparing exh EG5 with both the marked copy and unmarked copy, this court finds that exh EG5 corresponds with the unmarked copy in terms of the handwriting of the dates and the signature. It is fairly obvious therefore that when the magistrate court faxed a copy of the consent the sender picked the unmarked copy. That explains why exh EG5 does not have the marking 'B' at the top right hand corner similar to exh RIH3. As for the absence of the name chop or name of the deputy public prosecutor, that can be attributed to the faint light blue color name chop that was affixed to the consent. The poor quality of the name chop may have caused its image to be lost and not capable of being reproduced when it was transmitted via facsimile. Based on those reasons this court finds no reason to conclude that exh EG5 is an invalid consent. The unmarked copy as found in the file has the name chop of the deputy public prosecutor, the date and signature. In the evaluation and finding of this court, this copy therefore constitutes a valid proof of consent under s 32A of the Act.

With regards to exh RIH3

[29] Comparing exh RIH3 to the marked copy this court finds that they are exact copies with regards to the marking 'B' at the top right hand corner, handwriting of the date, the initial next to the figure '8' and the signature. The absence of the name chop or name of the deputy public prosecutor in exh RIH3 can similarly be explained like in the case of exh EG3. The faint light blue name chop could not be reproduced when photocopied. In the opinion of this court, the mystery of the missing name chop in both exhs EG5 and RIH3 is thereby solved.

[30] Since this court has accepted the unmarked copy as sufficient proof of consent pursuant to s 32A of the Act, then what remains to be determined with regards to exh RIH3 is academic. Nonetheless, for the sake of completeness this court finds that the marked copy is the copy that was marked as encl B when this case was called for mention before the magistrate on 10 October 2018. This court therefore finds that the magistrate had not erred in rejecting the applicant's preliminary objection. Based on both copies of the consent as found in the file, there is therefore no doubt that a valid consent was filed in accordance with s 32A of the Act.

GENERAL OBSERVATION

[31] In reading the notes of proceedings before the magistrate court this court finds that this NOM could have been avoided if parties had taken proper and effective steps to clarify the issues before the magistrate.

[32] At para 11 of AIS-E it was stated that the consent was marked as exh P1 on the mention date of 28 May 2019. Yet, the inspection of the file only showed that the consent was marked as 'encl B' and there is no other copy of the consent marked as 'P1'. The re-marking, as it were, of the consent was unnecessary as it was already marked as 'encl B' on 10 October 2018. This consequently contributed to and caused further confusion to the matter.

[33] That confusion was then compounded after the applicant received exh EG5 from the magistrate court. It seems that from the notes of proceedings neither the prosecution nor the applicant's counsel took any step to request for a physical inspection of the consent in the file on 28 May 2019 or on any date before the NOM was filed. That small step could have answered all issues and concluded the matter. This court can only guess that since the focus was on the copy of the consent that was provided to the applicant pursuant to s 51A of the CPC, all the parties' concerned overlooked to consider that the only relevant copy to be considered is the one that was filed with the magistrate court and this could have been easily determined by inspecting the file.

[34] The adventure to obtain copies of the consent via facsimile and photocopy further proved to be unhelpful. It must have escaped the attention of the sender of the documents that faint name chops or prints may not be able to be clearly reproduced when sent via facsimile or photocopied. It seems also that there was no care taken to ensure that the facsimile or photocopy will be able to reproduce an exact copy of the original document. If that was done much of the court's and respective Parties time and costs, here and below, would have been saved.

DECISION

[35] Therefore, based on all the matters stated above, the notice of motion is hereby dismissed.

[36] The matter is hereby remitted back to the magistrate court for trial and a mention date shall be fixed by the magistrate court for that purpose.

Notice of motion dismissed.

Reported by Dzulqarnain Ab Fatar